In The

Supreme Court of the United States

CARLYLE FORTRAN TRUST,

Petitioner,

vs.

NVIDIA CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BETTY M. SHUMENER
HENRY H. OH
Counsel of Record
DLA PIPER LLP (US)
550 South Hope Street, Suite 2300
Los Angeles, California 90071-2678
Telephone: (213) 330-7700
Facsimile: (213) 330-7701

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In 1972, the United States Supreme Court held in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 428 (1972), that a bankruptcy trustee lacks standing to sue third parties on behalf of a class of creditors. Since *Caplin*, there has been a "**divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt." *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996). *See also Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions . . . have decided this issue of a trustee's standing in **diametrically opposite ways**."); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.").

1. Was the Ninth Circuit correct in rejecting the "line of cases" published by the Second, Eighth and Eleventh Circuits which held that a creditor has standing to assert general creditor claims under *Caplin*?

The Second Circuit has adopted the *Wagoner* rule, which provides that, "A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991). The Ninth Circuit, in the unpublished opinion below, held that

QUESTIONS PRESENTED – Continued

"the *Wagoner* rule has been much criticized and we decline to follow it." Pet. App. 7 (citing *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007)).

2. Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?

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3. As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third party for causing the debtor in bankruptcy (tenant) to breach the lease?

As between a Chapter 11 reorganization trustee and a creditor, does the creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) "cap"?

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4. If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?

Does an E-mail from the buyer admitting that the buyer "bought" those assets satisfy the statute of frauds?

PARTIES TO THE PROCEEDING

Petitioner is Carlyle Fortran Trust.

Respondents are nVidia Corporation, nVidia US Investment Company, f/k/a Titan Acquisition Corp. No. 2, Jen-Hsun Huang, James C. Gaither, A. Brooke Seawell, William J. Miller, Tench Coxe, Mark A. Stevens, Harvey C. Jones, Stephen H. Pettigrew, Christine B. Hoberg, Richard A. Heddleson, Gordon A. Campbell, James Whims, James L. Hopkins, Scott D. Sellers, and Alex M. Leupp.

CarrAmerica Realty Corporation, CarrAmerica Realty, LP, Carr Office Park, LLC, and Carr Texas OP, L.P. (collectively, "CarrAmerica Parties") are appellants in the appeal (Ninth Circuit Docket No. 06-17109) that was consolidated with the appeal filed by petitioner Carlyle Fortran Trust (Ninth Circuit Docket No. 07-15077). Petitioner Carlyle Fortran Trust has been informed that the CarrAmerica Parties are not joining in this Petition or filing their own Petition.

CORPORATE DISCLOSURE STATEMENT

The parent company of Carlyle Fortran Trust is Carlyle Fortran Holdings, L.L.C. No publicly held company owns 10% or more of the ownership interests of any of the above referenced entities.

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The opinion of the Ninth Circuit Court of Appeals ("Ninth Circuit") was unreported and is reprinted at Pet. App. 8. The order of the Ninth Circuit amending the opinion and denying the petition for rehearing *en banc* is reprinted at Pet. App. 35-37. The order of the United States District Court for the Northern District of California was unreported and is reprinted at Pet. App. 9-34.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was issued on November 25, 2008. Pet. App. 1. A timely petition for rehearing *en banc* was denied on January 22, 2009. Pet. App. 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 11 U.S.C. § 502(b), 11 U.S.C. § 524(a) and (e), Cal. Civ. Code § 1624, Cal. Civ. Code § 1633.4, Cal. Civ. Code § 1633.7, and Cal. Civ. Code § 1633.9 are reprinted in Pet. App. 38-44.

STATEMENT OF THE CASE

I. INTRODUCTION

The underlying appeal is from an order dismissing the complaint of petitioner Carlyle Fortran Trust ("Carlyle") under Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of standing. First and foremost, the issue in this appeal is whether a creditor or a trustee in bankruptcy has standing to assert "general" creditor claims against third parties. This issue raises a complex question of bankruptcy law that has engendered irreconcilable inter-circuit conflicts ever since *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) – conflicts that have been well documented and recognized in numerous published opinions and treatises. *See e.g.*, *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 696 (2d Cir. 1989) ("The courts that have considered this issue, however, have reached **differing conclusions**."); *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions (released since the writing of the above *Koch* opinion but prior to its publication) have decided this issue of a trustee's standing in **diametrically opposite ways**."); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not

asked, and therefore was not answered, in *Caplin*."); Richard J. Corbi, *Causes of Action: What Is and Is Not Part of the Bankruptcy Estate?*, 17 NORTON J. BANKR. L. & PRAC. 4 (2008) ("There are **divergent views** as to how the courts answer this question.").

Second, this appeal also presents an irreconcilable inter-circuit conflict with respect to the application of the *Wagoner* rule. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation.").

Third, this appeal concerns the issue of who has standing – the creditor (landlord) or reorganization trustee for the debtor (tenant) – to seek damages in excess of the bankruptcy cap ("cap") against an interfering third party who caused the debtor (tenant) to breach its lease with the creditor (landlord).

Finally, this appeal presents the question whether the statute frauds can be satisfied through E-mails. The opinion of the Ninth Circuit (which answered this question in the negative) is clearly contrary to California statutes and case law.

Carlyle respectfully petitions for writ of certiorari for a review of the opinion of the Ninth Circuit so that profound and "diametrically opposite" inter-circuit conflicts concerning important issues of bankruptcy law finally may be resolved.

II. FACTS

A. The nVidia Agreement

The underlying lawsuit arises out of a highly unusual agreement, labeled an "asset purchase" agreement, between 3dfx Interactive, Inc., the debtor ("3dfx"), and respondent nVidia Corporation ("nVidia"), a publicly traded corporation, pursuant to which nVidia acquired substantially all of 3dfx's assets for a combination of cash and nVidia stock. Subject to a certain exception, the "asset purchase" agreement between 3dfx and nVidia provided that while the cash was available to 3dfx to satisfy the obligations owed to its creditors, the nVidia stock could be distributed only to 3dfx's shareholders and not the creditors.

Carlyle is the owner and landlord of an office building in San Jose, California. 3dfx was a public company which developed and sold graphics chips out of the office building that 3dfx leased from Carlyle.

3dfx and nVidia were competitors. In December 2000, 3dfx (which was then insolvent), nVidia, and respondent nVidia US Investment Company ("nVidia Sub"), entered into an "asset purchase" agreement ("nVidia Agreement") whereby (a) nVidia agreed to purchase substantially all of 3dfx assets for an immediate payment of $70,000,000 cash and a contingent payment of 1,000,000 shares of nVidia common stock (then worth more than $50,000,000), which could be transferred only to 3dfx's insiders, and (b) 3dfx agreed to (i) cease operations, (ii) discharge over $119,000,000 in liabilities of 3dfx and its subsidiary,

STB Systems, Inc., **with only the $70,000,000 cash**, and (iii) wind up its business and dissolve.

nVidia knew that the wind up and dissolution of 3dfx constituted an event of default under Carlyle's lease ("Lease") because nVidia had performed extensive due diligence of 3dfx, including a review of the Lease, prior to executing the nVidia Agreement. Nevertheless, the nVidia Agreement required 3dfx to breach Carlyle's Lease by, among other things, winding up its business and dissolving.

nVidia initially offered to pay $100,000,000 cash for substantially all of 3dfx's assets, which would have been available in the entirety to 3dfx's creditors. The directors and officers of 3dfx ("3dfx Ds&Os") were also shareholders of 3dfx who held lucrative stock options. The 3dfx Ds&Os declined that offer and devised a scheme to divert funds away from 3dfx's creditors to 3dfx's shareholders, with nVidia's help.

Under the nVidia Agreement, 3dfx would receive the stock (then worth over $50,000,000) only if 3dfx discharged the $119,000,000 owed to creditors with only the $70,000,000 in cash. 3dfx could not use the stock to discharge liabilities to creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of stock. If 3dfx succeeded, the 1,000,000 shares of stock would go to 3dfx's insiders. Paragraph 1.3(a) of the nVidia Agreement provides:

> The Stock Consideration . . . shall only become deliverable by [nVidia Sub] to [3dfx] upon and subject to the completion of the winding up of the business of [3dfx] pursuant

> to the Plan of Dissolution, and delivery to [nVidia Sub] of a certificate . . . that all Liabilities of [3dfx and its subsidiaries and affiliates] have been paid . . . **from sources other than the Stock Consideration** and that [3dfx] has been validly dissolved. . . .[1]

If 3dfx had persuaded its creditors to accept substantially less than the amounts owed by claiming that only $70,000,000 in cash was available under the nVidia Agreement to discharge more than $119,000,000 in liabilities, 3dfx would have succeeded in diverting more than $50,000,000 worth of nVidia stock to 3dfx's insiders and shareholders, at the expense of 3dfx's creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of nVidia stock and obtain a $50,000,000 windfall, at the expense of 3dfx's creditors.

Either way, whether 3dfx won or nVidia won, the creditors were certain to lose.

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[1] Under paragraph 1.3(b) of the nVidia Agreement, 3dfx also was provided the option of obtaining a one-time $25,000,000 payment if (i) the $70,000,000 Cash Consideration is not sufficient to pay the liabilities of 3dfx and its subsidiaries, and (ii) 3dfx demonstrates that the additional $25,000,000 payment is sufficient to pay all of the remaining liabilities of 3dfx and its subsidiaries to nVidia's satisfaction. In the event that nVidia advanced the $25,000,000 payment, the number of shares that constitutes the Stock Consideration would be reduced by 500,000 shares.

If nVidia failed to make the additional $25,000,000 payment, 3dfx would have received only $70,000,000 and, faced with $119,000,000 in liabilities, would have no alternative but to file bankruptcy. Indeed, nVidia failed to make the $25,000,000 payment, and 3dfx filed bankruptcy.

B. nVidia's Assumption Of Carlyle's Lease

3dfx's rent under Carlyle's Lease was only $1 per square foot when market rent exceeded $3 per square foot at the height of the dot com boom in the Silicon Valley. As a result, nVidia knew that Carlyle's Lease was worth at least $3,000,000 and expressly agreed to assume that Lease under the nVidia Agreement. In December 2000, Carlyle offered to buy out 3dfx's remaining term of the Lease for $1,000,000 so that Carlyle could relet the building to another tenant at a higher rent. On December 21, 2000, 3dfx asked nVidia how to respond to Carlyle's offer. nVidia ordered 3dfx to reject Carlyle's offer to buy out the Lease.

When 3dfx and nVidia signed the nVidia Agreement on December 15, 2000, the schedules which specify the assets being acquired by nVidia were being finalized and had not yet been attached to the nVidia Agreement. Accordingly, the nVidia Agreement contained a provision stating that such schedules were to be delivered on December 18, 2000. As required under the nVidia Agreement, on December 18, 2000, 3dfx delivered to nVidia the schedules to the nVidia Agreement ("Schedules") identifying the various assets that nVidia had bought on December 15, 2000. The Schedules identified Carlyle's Lease as one of the "Assumed Contracts" that nVidia had assumed under the nVidia Agreement.

By March 2001, however, the "dot com crash" hit, causing a radical downturn in real estate that saw vacancy jump 60% and rents plummet 21%. As a

result, nVidia refused to assume the Lease, despite its agreement to do so under the nVidia Agreement, because the Lease, which had been a $3,000,000 asset in December 2000, became a $7,000,000 liability in March 2001. The 3dfx Ds&Os and the directors and officers of nVidia ("nVidia Ds&Os") agreed to switch the December 18, 2000 Schedules with schedules excluding Carlyle's Lease as an "Assumed Contract" after the closing on April 18, 2001 so that nVidia could dump the liability for Carlyle's Lease back on 3dfx, which had been rendered insolvent as of December 15, 2000. Carlyle discovered the existence of the December 18, 2000 Schedules only through discovery after (a) the lawsuit had commenced, (b) Carlyle filed numerous motions to compel against nVidia, and (c) the Bankruptcy Court issued more than $100,000 in discovery sanctions against nVidia.

C. 3dfx's Breach and Bankruptcy

On April 18, 2001, after the nVidia Agreement closed, 3dfx transferred substantially all of its assets to nVidia, including all of its key patents and intellectual property. The remaining assets were sold for nominal amounts. Overnight, more than 100 of 3dfx's top engineers became nVidia's employees, and the rest were terminated. 3dfx ceased normal business operations, abandoned its facilities, and stopped paying rent under the Lease.

On May 10, 2002, Carlyle filed a complaint in state court against 3dfx, nVidia, and their respective directors and officers. Carlyle's complaint, as amended,

alleged claims for interference with Lease and economic relations, breach of Lease, successor liability, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, among other causes of action. On October 15, 2002, 3dfx filed bankruptcy.

On January 3, 2003, nVidia, nVidia Sub, and the nVidia Ds&Os (collectively, the "nVidia Defendants") removed Carlyle's action to the Bankruptcy Court. On January 23, 2003, the Bankruptcy Court appointed William A. Brandt, Jr. as the Chapter 11 reorganization trustee for 3dfx (the "Trustee"). On March 12, 2003, the Trustee filed a complaint against nVidia and nVidia Sub for Avoidance of Fraudulent Transfer, Recovery of Voidable Transfer, and De Facto Merger. On September 11, 2008, the Bankruptcy Court entered a judgment in favor of nVidia and nVidia Sub dismissing all of the claims asserted by the Trustee.

Although the nVidia Defendants had removed Carlyle's lawsuit to the Bankruptcy Court and litigated there for three years, on January 18, 2005, the nVidia Defendants filed a Motion for Withdrawal of Reference of Carlyle's action on the ground that the nVidia Defendants were entitled to a jury trial. On May 6, 2005, the District Court entered an order withdrawing the reference of Carlyle's action.

On June 30, 2005, Carlyle filed its Third Amended Complaint, which added claims for express assumption of the Lease and aiding and abetting breach of fiduciary duty. nVidia filed a motion to dismiss the new claims. On November 10, 2005, the

District Court entered an order dismissing, with leave to amend, Carlyle's new claims and dismissing *sua sponte* Carlyle's preexisting claims for lack of standing.

On February 1, 2006, Carlyle filed a Fourth Amended Complaint. Approximately 10 months later, on December 15, 2006, the District Court dismissed the complaint without leave to amend on the grounds that Carlyle's claims are "general creditor claims" because the claims arose from the nVidia Agreement which "affected all creditors," and that Carlyle lacked standing to pursue "general creditor claims" under *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir. 1997). Pet. App. 14 & 20.

On January 9, 2007, Carlyle filed a Notice of Appeal. On November 25, 2008, the Ninth Circuit affirmed the dismissal of Carlyle's complaint. On January 22, 2009, the Ninth Circuit denied Carlyle's Petition for Rehearing *En Banc*.

D. Basis for Federal Jurisdiction In the Court Of First Instance

The nVidia Defendants removed Carlyle's action to the Bankruptcy Court pursuant to 28 U.S.C. §§ 157, 1334 and 1452. Accordingly, the basis for federal jurisdiction in the court of first instance is 28 U.S.C. §§ 157, 1334 and 1452.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING THE INTERPRETATION OF THIS COURT'S DECISION IN *CAPLIN*

In *Caplin*, the debtor corporation executed an indenture with an indenture trustee pursuant to which the debtor issued $8,607,600 in debentures. To protect the debenture holders, the debtor covenanted to file certificates with the indenture trustee regarding debtor's obligation to maintain an asset to liability ratio of 2:1. The debtor sustained substantial losses for years without the debenture holders' knowledge because the indenture trustee breached its obligation to confirm the accuracy of the debtor's certificates.

After the debtor filed bankruptcy, the reorganization trustee filed an action on behalf of the debenture holders against the indenture trustee for failing to compel debtor's compliance with the indenture. The reorganization trustee argued that it was more desirable for him to prosecute the claims against the indenture trustee on behalf of all creditors rather than the creditors filing numerous individual lawsuits against the indenture trustee. The Supreme Court rejected this argument, holding that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders." *Caplin*, 406 U.S. at 428.

Caplin concerned a cause of action brought by the bankruptcy trustee on behalf of a certain **class** of creditors. *In re Miller*, 197 B.R. 810, 812 (W.D.N.C. 1996) ("*Caplin* concerned a cause of action brought by the bankruptcy trustee on behalf of a class of creditors (not the creditors generally)"). As a result, *Caplin* engendered a split of authority whether a bankruptcy trustee lacks standing to sue on behalf of creditors generally or only a certain class of creditors. *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *Miller*, 197 B.R. at 814 ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.").

A review of the decisions interpreting *Caplin* demonstrates that there are profound and irreconcilable inter-circuit and intra-circuit conflicts regarding whether a bankruptcy trustee has standing to pursue "general" claims on behalf of creditors.

A. Inter-Circuit Conflict

The Second Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring "general" creditor claims. *Mixon v. Anderson (In re Ozark Restaurant Equipment Co.)*, 816 F.2d 1222 (8th Cir. 1987) ("**no trustee**, whether a

reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, **has power under Section 544 of the Code to assert general causes of action**, such as the alter ego claim, **on behalf of the bankrupt estate's creditors**"); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) ("**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, has power under . . . the Code to assert **general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors."); *E.F. Hutton*, 901 F.2d at 985 ("we approve the reasoning of the Ninth Circuit in *Williams*, an analogous case factually and procedurally, and the Eighth Circuit in *Ozark Equip. Co.*, where those respective circuit courts determined that the bankruptcy trustee does not have standing to assert claims of creditors of the bankrupt"), *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy **trustee has no standing generally** to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.").

The Second Circuit, the Seventh Circuit, the Ninth Circuit Bankruptcy Appellate Panel, and the Ninth Circuit in the unpublished opinion below, read *Caplin* narrowly and for the proposition that only the bankruptcy trustee can pursue "general" creditor claims. *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("A trustee may maintain only a **general claim**."); *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir.

1997) ("'If a **claim is a general one**, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee's action.'") (citing *Kalb*, 8 F.3d at 132); Pet. App. 6 ("The district court did not err by relying on *In re Folks*, 211 B.R. 378"); *Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) ("If a claim is a **general** one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee's action.").

B. Intra-Circuit Conflict

Not only has *Caplin* engendered an inter-circuit split of authority, Courts of Appeals within the same circuit also have interpreted *Caplin* in a profoundly conflicting manner.

For example, the Ninth Circuit's holding in *Williams*, 859 F.2d at 667, that "**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, **has power** under . . . the Code **to assert general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors," cannot be reconciled with the Ninth Circuit Bankruptcy Appellate Panel's holding in *Folks*, 211 B.R. at

387, that an alter ego claim is "a **general claim** and '**cannot belong to any individual creditor**.'"

The Second Circuit's holding in *St. Paul Fire*, 884 F.2d at 700 ("the trustee is the only one with standing to bring a certain action, because of the generalized nature of the injury"), cannot be reconciled with the Second Circuit's holding in *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors"). *See also Miller*, 197 B.R. at 814 n.5 ("**The Court is unable to reconcile the Second Circuit's** broad view of the trustee's powers under § 544 in *St. Paul Fire*, *supra*, with the Second Circuit's later decision in *Shearson Lehman v. Wagoner*, 944 F.2d 114, 118-20 (2nd Cir.1991) where the Court, relying on *Caplin*, held that the bankruptcy trustee for the debtor (HMK) did not have standing to assert claims for dissipation of corporate funds and what seems the equivalent of an alter ego claim against Shearson because those claims belonged to the creditors of HMK, or the Court's later decision in *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092-94 (2nd Cir.1995), where the Court held that the trustee for the debtor did not have standing to pursue claims of investors in the limited partnerships managed by the debtor against the debtor's accounting firm.").

The Seventh Circuit's holding in *Koch Refining*, 831 F.2d at 1349 ("A trustee may maintain only a general claim"), cannot be reconciled with the Seventh Circuit's holding in *Steinberg v. Buczynski*, 40

F.3d 890, 893 (7th Cir. 1994) ("The claim in such a case is said to be 'personal,' not 'general.' That is not an illuminating usage. The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor."). *See also Miller*, 197 B.R. at 813 n.4 ("The Court finds the broad view of the trustee's powers advanced in *Koch*, *supra*, has been eviscerated by the Court's later opinion in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), where the Seventh Circuit, cited *Caplin*, *supra*, and held that the trustee for the debtor (Ted's Plumbing, Inc.) did not have standing to assert an action on behalf of a creditor (the pension fund) noting that the distinction between 'personal' and 'general' claims offered in *Koch*, *supra*, 'is not an illuminating usage' *id.* at 893, a sentiment with which this Court wholeheartedly agrees."); *Alberts v. Tuft (In re Greater Southeast Community Hospital Corp.)*, 2005 WL 3036507 (Bankr. D.D.C. 2005) ("Indeed, the Seventh Circuit effectively overruled *Koch* in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), for this exact reason.").[2]

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[2] Similarly, Carlyle believes that the only way to reconcile the Ninth Circuit's decision in *Williams* with the Ninth Circuit B.A.P.'s decision in *Folks* is to overrule *Folks*. The Ninth Circuit in the opinion below declined to do so.

C. A Review Is Necessary To Resolve "Diametrically Opposite" Inter-Circuit And Intra-Circuit Conflicts

Carlyle respectfully believes that this appeal provides a compelling demonstration why the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, the Eleventh Circuit in *E.F. Hutton*, and the Second Circuit in *Wagoner* interpreted *Caplin* correctly and why the Seventh Circuit in *Koch Refining*, the Ninth Circuit Bankruptcy Appellate Panel in *Folks*, the Ninth Circuit in the unpublished opinion below, and the Second Circuit in *Kalb* interpreted *Caplin* incorrectly.

In *Caplin*, the Supreme Court "identified three factors militating against finding standing" for a reorganization trustee. *Williams*, 859 F.2d at 666; *Mixon*, 816 F.2d at 1266; *E.F. Hutton*, 901 F.2d at 986.

"First, nowhere in the statute did the Court find any provision enabling the trustee 'to collect money not owed to the estate.'" *Williams*, 859 F.2d at 666 (quoting *Caplin*, 406 U.S. at 428). Because the rights under a lease accrue only to the landlord, not to creditors of the tenant, only the landlord has standing to sue a third party for inducing the tenant to breach the lease. For example, damages arising from nVidia's interference with the Lease (*i.e.*, the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. The Trustee lacks standing to collect money not owed to

the estate. *Id.* Even if the Trustee could collect money owed to Carlyle, he could not recover any money owed to Carlyle in excess of the "cap," as such funds are not owed by or to the debtor (tenant). 11 U.S.C. § 502(b)(6). See Part III, *infra*. Indeed, the Trustee and the creditors in general have an incentive to "cap" Carlyle's lease damage claims against the 3dfx estate because the "cap" will result in a greater *pro rata* distribution to the unsecured creditors.

"Second, the [Supreme] Court noted that the debtor had no claim against the indenture trustee. At the most, then, the trustee's claims described a situation where the debtor and the indenture trustee were *in pari delicto*. Since it appeared that the indenture trustee would be entitled to be subrogated to the position of the debenture holders against the debtor, the Court saw no advantage to giving the trustee standing to sue." *Id.* (citing *Caplin*, 406 U.S. at 429-30). Here, 3dfx (the debtor) and the nVidia Defendants were also *in pari delicto* as the nVidia Defendants conspired with 3dfx to defraud the creditors of 3dfx. See Part II, *infra*.

"The third problem troubling the [Supreme] Court was the possibility that the trustee's suit on behalf of debenture holders could be 'inconsistent with any independent actions that they might bring themselves.'" *Id.* at 666 (quoting *Caplin*, 406 U.S. at 431-32). As the Ninth Circuit noted in *Williams*:

> The failure of the Trustee to obtain assignments from all the investors bears out the

> *Caplin* Court's fear that "it is extremely doubtful that the trustee and all [creditors] would agree on the amount of damages to seek, or even on the theory on which to sue." Inconsistent actions increase the chance that the Trustee will find her interests diverging from those of the investors on whose behalf she is suing.

Id. at 667 (quoting *Caplin*, 406 U.S. at 432).

Here, the Trustee finds that (a) the interests of 3dfx shareholders conflict with the interests of 3dfx creditors,[3] (b) the interests of creditors that 3dfx inherited from STB conflict with the interests of other 3dfx creditors, and (c) the interests of 3dfx shareholders and creditors who benefit by "capping" Carlyle's claims conflict with the interests of Carlyle, whose claims against solvent third parties (such as nVidia) should not be capped.

Despite the "three factors militating against finding standing" for a reorganization trustee enunciated by this Court in *Caplin*, the primary reason why the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* found that a reorganization

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[3] Indeed, when the Creditors' Committee sought to enter into a settlement with the Trustee before the Bankruptcy Court conducted a trial of the Trustee's claims against nVidia and nVidia Sub, the Trustee opposed the Creditors' Committee's settlement with nVidia on the ground that, "While the assumptions underlying that estimate of recovery to creditors may be subject to challenge, it is clear that equity holders under the settlement would receive nothing."

trustee should have exclusive standing to pursue general creditor claims was the concern of numerous individual lawsuits filed by creditors against third parties. *Miller*, 197 B.R. at 814 ("There is a common-sense concern that drives these decisions. They reason that the Trustee must have authority to pursue causes of action that injure the creditors generally, because otherwise individual creditors will rush to pursue the action and receive judgments, thereby circumventing the equality of distribution among creditors that is so fundamental to the bankruptcy scheme; in order to avoid this result, these courts reason that the trustee (not individual creditors) should have standing to pursue such claims.") (citing *Koch*, 831 F.2d at 1349; *St. Paul Fire*, 884 F.2d at 700-02; and *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275-76 (5th Cir. 1983)). However, the Supreme Court in *Caplin* already had anticipated and addressed this concern when it explained that "Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of these difficulties." *Id.* at 433. Indeed, the regulatory scheme governing class actions provides far greater due process protections to creditors than conferring exclusive standing on a reorganization trustee in the place of such creditors (for example, the right to opt out if the class representative is inadequate or the right to have its own day in court if the interests of other creditors conflict with the interests of the individual creditor).

Finally, the fact that the Congress had an opportunity to overrule *Caplin* and confer exclusive standing on the reorganization trustee to pursue general creditor claims, and that Congress chose not to do so, demonstrates that the narrow reading of *Caplin* by the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* is contrary to the Congressional intent and legislative history of 11 U.S.C. § 544. In *Caplin*, this Court expressly invited Congress to decide whether or not to grant such standing to the reorganization trustee.

> Congress might well decide that reorganizations have not fared badly in the 34 years since Chapter X was enacted and that the status quo is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee's action was exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these questions arise in the context of litigation. Whatever the decision, it is one that only Congress can make.

Caplin, 406 U.S. at 434-35.

As the Eighth Circuit explained in *Mixon*, Congress declined the Supreme Court's invitation to overturn *Caplin*.

> In 1978, six years after *Caplin* was decided, Congress overhauled the bankruptcy laws when it enacted the Bankruptcy Code. As part of the revision, Congress consolidated former sections 70c and 70e of the Act (11 U.S.C. §§ 110(c), (e) of former title 11) into Sections 544(a) and (b) of the Code, respectively, which apply to both reorganization and liquidation trustees. Although Section 544 clarified and expanded the trustee's role with respect to creditors, in no way was it changed to authorize the trustee to bring suits on behalf of the estate's creditors against third parties. In fact, the legislative history suggests just the opposite.
>
> As originally proposed by the House, Section 544 was to contain a subsection (c), which was intended to overrule *Caplin*. It is extremely noteworthy, however, that this provision was deleted before promulgation of the final version of Section 544. Because subsection (c), as a part of Section 544, would have applied to both reorganization and liquidation trustees, and because Congress refused to enact subsection (c), we believe Congress' message is clear – no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action, such as the

> alter ego claim, on behalf of the bankrupt estate's creditors.

816 F.2d at 1227-28.

Thus, the interpretation of *Caplin* by the Second Circuit in *Wagoner*, the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, and the Eleventh Circuit in *E.F. Hutton*, is supported by the Congressional intent and legislative history of 11 U.S.C. § 544.

In sum, it has been 37 years since this Court addressed the question of standing between a reorganization trustee and individual creditors in *Caplin*. *Mixon*, 816 F.2d at 1228 ("*Caplin* is still good law and is **the only Supreme Court case to address the standing question**"). Ever since this Court issued its opinion in *Caplin*, the Second, Seventh, Eighth, Ninth, and Eleventh Circuits have interpreted *Caplin* in "diametrically opposite ways," *Koch Refining*, 831 F.2d at 1349, sometimes even within the same Circuit. The Court should grant this petition to clarify and resolve profound inter-circuit and intra-circuit conflicts and confusion regarding the "diametrically opposite" interpretation of *Caplin*.

II. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT CONFLICTS REGARDING THE APPLICATION OF THE *WAGONER* RULE

The "*Wagoner* rule" states that under the *in pari delicto* doctrine, the reorganization trustee lacks standing to sue third parties for conspiring with a

corporate debtor to defraud creditors. *Wagoner*, 944 F.2d at 118 ("when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors"). The *Wagoner* rule should apply here because Carlyle alleged that the bankrupt corporation (*i.e.*, 3dfx) conspired with the nVidia Defendants to defraud the creditors of 3dfx by diverting the one million shares of nVidia stock to 3dfx's insiders under the nVidia Agreement.

Other circuits, including the Ninth Circuit in the opinion below, however, have refused to follow the Second Circuit in applying the *Wagoner* rule. Pet. App. 7 ("However, the *Wagoner* rule has been much criticized and we decline to follow it. *See In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing)."). This appeal provides a compelling demonstration why the Second Circuit in *Wagoner* correctly applied the *Wagoner* rule and why the Eighth Circuit in *Senior Cottages* and the Ninth Circuit in the unpublished opinion below incorrectly refused to follow the *Wagoner* rule.

The Ninth Circuit held here that "the district court properly concluded that the Trustee has **exclusive standing**" to assert general creditor claims. Pet. App. 5. Because (a) the Trustee stands in the shoes of the debtor and its claims against the nVidia Defendants would be barred by the *in pari delicto* doctrine,

Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("trustee succeeds only to such rights as the bankrupt possessed; and the **trustee is subject to all** claims and **defenses which might have been asserted against the bankrupt** but for the filing of the petition"), and (b) innocent creditors are barred from pursuing general creditor claims, the defendants in this case will escape scot-free for their role in conspiring with 3dfx to defraud the creditors.

Indeed, although this Court decided *Caplin* well before the Second Circuit decided *Wagoner*, this Court prophetically recognized and anticipated this exact problem in *Caplin*. *Caplin* articulated "three problems" why a reorganization trustee lacks standing to assert claims on behalf of creditors, one of which was that the trustee was "*in pari delicto*" with the defendant. 406 U.S. at 429-30 ("This brings us to the second problem with petitioner's argument. Nowhere does petitioner argue that Webb & Knapp could make any claim against Marine. Indeed, the conspicuous silence on this point is a tacit admission that no such claim could be made. Assuming that petitioner's allegations of misconduct on the part of the indenture trustee are true, petitioner has at most described a situation where Webb & Knapp and Marine were *in pari delicto*.") (footnote omitted). Thus, *Caplin* confirms that the *Wagoner* rule should be followed.

In sum, the Supreme Court should grant this petition to resolve irreconcilable inter-circuit conflict regarding the application of the *Wagoner* rule.

III. REVIEW IS NECESSARY TO RESOLVE AN ISSUE OF FIRST IMPRESSION WHETHER A REORGANIZATION TRUSTEE HAS STANDING TO PURSUE A LANDLORD CREDITOR'S LEASE DAMAGES IN EXCESS OF THE "CAP"

Carlyle alleged that the nVidia Defendants intentionally and negligently interfered with Carlyle's Lease by (i) contractually requiring 3dfx to discontinue its operations and dissolve, in breach of the Lease, and (ii) failing to assume the Lease after having rendered 3dfx insolvent.

Damages arising from the nVidia Defendants' interference with the Lease (*i.e.*, the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. Rents due under the Lease are owed to Carlyle, not to the tenant (*i.e.*, the 3dfx estate). The Trustee lacks standing to collect money not owed to the estate. *Caplin*, 406 U.S. at 428 (nothing in the Bankruptcy Code enabled the trustee "to collect money not owed to the estate"); *Williams*, 859 F.2d at 667 (the Trustee lacked standing because "the Trustee, as in *Caplin*, is attempting to 'collect money not owed to the estate' ").

Even if the Trustee, not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee cannot and does not), the Trustee cannot pursue Carlyle's Lease damages in excess of the "cap" imposed by 11 U.S.C. § 502(b)(6) as a matter of law because the "cap" limits the estate's liability to

Carlyle to no more than "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease." In other words, even if the 3dfx estate has sufficient assets to make a 100% distribution to all creditors, it may pay Carlyle only $3,500,000 under the 11 U.S.C. § 502(b)(6) "cap," not the full $11,000,000 or more actually owed under the Lease. Since the estate is not liable for more than the capped claim, the Trustee has no standing to pursue claims *in excess* of its capped damages. *Bullfrog Films Inc. v. Wick*, 847 F.2d 502, 506 n.4 (9th Cir. 1988) ("At an 'irreducible minimum' Article III standing requires that a plaintiff show (1) 'that he personally has suffered some actual or threatened injury' as a result of defendant's conduct, (2) that the injury 'fairly can be traced to the challenged action' and (3) that the injury 'is likely to be redressed by a favorable decision.'") (quoting *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, (1982)). Thus, even if the Trustee, and not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee does not), only Carlyle has standing to pursue Lease damages in excess of the "cap."

Despite extensive research, Carlyle did not find any case law addressing the question whether a reorganization trustee would have standing to pursue lease damages in excess of the "cap" on behalf of a

landlord creditor. The Ninth Circuit in the unpublished opinion below held that:

> We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim.

The Ninth Circuit's reasoning is erroneous. As pointed out by the Ninth Circuit, the "cap" operates as a limitation of a landlord creditor's claims **against the bankrupt estate, not against solvent (indeed, multi-billion dollar) third parties** like nVidia. To the contrary, it is well established that landlord creditors whose claims are capped against the bankruptcy estate have standing to sue third parties for the full amount of their claims in *excess* of the capped amount chargeable to the debtor's estate. 11 U.S.C. § 524(e); *Kopolow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8th Cir. 1990) ("Although the Bankruptcy Code limits the amount which a lessor can claim against the debtor's bankrupt estate following the Trustee's rejection of an unexpired lease, **that limitation does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate.**").

Kopolow held that the 11 U.S.C. § 502(b)(6) "cap" does not bar lessor's lawsuit against a third party

who "guaranteed the debtor's lease obligations." The Court of Appeal reasoned that "under the Bankruptcy Code, even the 'discharge of debt of the debtor **does not affect the liability of any other entity on . . . such debt**.'" *Id.* (citing 11 U.S.C. § 524(e)).

In *Landsing Diversified Properties-II v. First National Bank and Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990), two transformers maintained by a company named PSO exploded, causing substantial damage to the debtor's facility. The debtor retained an attorney named Abel on a contingency fee basis to litigate against PSO. Abel filed suit against PSO and secured his fees by filing an attorney's lien under state law. The debtor settled with PSO and agreed to indemnify PSO should it be held liable to Abel for ignoring his attorney's lien.

The Tenth Circuit held that although Abel's claim against the debtor's estate must be "capped" at the reasonable value of Abel's services pursuant to 11 U.S.C. § 502(b)(4), *id.* at 596-98, it flatly rejected the argument that Abel was barred by the debtor's settlement and confirmation of the debtor's plan from pursuing damages in excess of the cap against PSO:

> Neither the confirmation of a plan nor the creditor's recovery (of partial satisfaction) thereunder bars litigation against third parties for the **remainder of the discharged debt**. **The same holds true specifically where**, as here, **the creditor's bankruptcy claim is** based on an executory contract that

> is both rejected under section 365(a) and **subject to limitation in amount by the bankruptcy court pursuant to section 502(b)**.

Id. at 601 (citation omitted).

Carlyle's claims for damages in excess of the cap cannot, and do not, belong to the Trustee because 3dfx (the debtor) is not liable to Carlyle for rents in excess of the cap. Since the Trustee has no standing to assert injuries which 3dfx has not sustained, the District Court's ruling and the Ninth Circuit's opinion below divest *both* Carlyle and the Trustee of standing to pursue claims for unpaid rents in excess of the "cap" against nVidia, a solvent third party.

The Bankruptcy Code was not designed to protect a solvent third party from wrongdoing. To the contrary, the law is settled that a landlord, like Carlyle, has standing to pursue damages in excess of the "cap" against any third parties. 11 U.S.C. § 524(e); *Kopolow*, 900 F.2d at 1191; *Landsing Diversified*, 922 F.2d at 601; 4 Collier on Bankruptcy ¶502.03[7][f] (the cap "'does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate,' and thus, the liability of a nondebtor guarantor or cotenant is not limited or altered by section 502(b)(6)").

In sum, the Court should grant this petition to address a question of first impression whether or not a reorganization trustee would have standing to

pursue lease damages in excess of the "cap" on behalf of a landlord creditor.

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER THE NINTH CIRCUIT ERRED IN FINDING THAT E-MAILS CANNOT SATISFY THE STATUTE OF FRAUDS

The Ninth Circuit below affirmed the dismissal of Carlyle's complaint on the ground that "Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." Pet. App. 7. However, Carlyle's complaint alleged that "the Lease was specifically identified and accepted as a Specified Asset and Assumed Contract under the Nvidia Agreement." In any event, the opinion below is contrary to California statute and case law for at least two reasons.

First, the statute of frauds is satisfied because the nVidia Agreement ***is*** signed. The December 18, 2000 Schedules are merely an exhibit to the signed nVidia Agreement, which 3dfx was required to deliver, and did deliver, on December 18, 2000, as required under the nVidia Agreement. Nothing in the California statute of frauds requires the separate signing of every exhibit and schedule to an agreement, in addition to the signing of the agreement itself. Cal. Civ. Code § 1624(a).

Second, Carlyle alleged that E-mails from nVidia satisfied the statute of frauds. For example, on January 31, 2001, Christine B. Hoberg (the Chief Financial Officer of nVidia) sent an E-mail to Richard A. Heddleson (Chief Executive Officer of 3dfx) demanding that 3dfx remove a mechanic's lien from Carlyle's Lease, as Carlyle's Lease was "one of the assets" that nVidia had "bought." The January 31, 2001 E-mail from nVidia states, "heard about the mechanics lien on the building. **[C]an you pay the $96k else the lease terminates and one of the assets we bought goes away.**"

If nVidia had not accepted the December 18, 2000 Schedules and purchased Carlyle's Lease, there was no reason why Hoberg would refer to Carlyle's Lease as "one of the assets that we [*i.e.*, nVidia] bought."

California law is well-settled that an E-mail is a sufficient "note or memorandum" that satisfies the statute of frauds. Cal. Civ. Code § 1624 (contracts "are invalid, unless they, or **some note or memorandum thereof**, are in writing and subscribed by the party to be charged or the party's agent"); 1 B.E. Witkin, Summary of California Law § 350 (10th ed. 2005) ("The memorandum is not the contract, but merely evidence of its terms; the oral agreement is the contract. Hence, an oral agreement may originally be subject to the bar of the statute, but may become enforceable if a note or memorandum is subsequently made.").

"If the email had been sent after January 1, 2000, there would be no question of its sufficiency under the Statute of Frauds because the Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.7 (2004), provides that a 'record or signature may not be denied legal effect or enforceability solely because it is in electronic form.'" *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005).[4] Here, Hoberg sent the E-mail on January 31, 2001, at least one year after the effective date of the Uniform Electronic Transactions Act.

In sum, the Court should grant this petition to correct a manifest error in the opinion below that Carlyle's complaint was barred by the statute of frauds.

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[4] On January 1, 2000, the Uniform Electronic Transaction Act became effective in California. Cal. Civ. Code § 1633.4 ("This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000."). *See also* Cal. Civ. Code §§ 1633.7 & 1633.9.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BETTY M. SHUMENER
HENRY H. OH
Counsel of Record
DLA PIPER LLP (US)
550 South Hope Street, Suite 2300
Los Angeles, California 90071-2678
Telephone: (213) 330-7700
Facsimile: (213) 330-7701
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARRAMERICA REALTY CORPORATION; CARR-AMERICA REALTY, LP; CARR OFFICE PARK, LLC; CARR TEXAS OP, L.P., Plaintiffs-Appellants and CARLYLE FORTRAN TRUST, Plaintiff v. NVIDIA CORPORATION; NVIDIA US INVESTMENT COMPANY; JEN-HSUAN HUANG; JAMES C. GAITHER; A. BROOKE SEAWELL; WILLIAM J. MILLER; TENCH COXE; MARK A. STEVENS; HARVEY C. JONES; CHRISTINE HOBERG; STEPHEN PETTIGREW; JAMES HOPKINS; JAMES WHIMS; GORDON A. CAMPBELL; RICHARD A. HEDDLESON;	No. 06-17109 D.C. No. CV-05-00428-JW MEMORANDUM* (Filed Nov. 25, 2008)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ALEX LEUPP; SCOTT D. SELLERS,

Defendants-Appellees

3DFX INTERACTIVE, Inc.,

Debtor-in-Possession-Appellee

WILLIAM A. BRANDT, JR.,

Trustee-Appellee

CARLYLE FORTRAN TRUST,

Plaintiff-Appellant

v.

NVIDIA CORPORATION; NVIDIA US INVESTMENT COMPANY; JEN-HSUAN HUANG; JAMES C. GAITHER; A. BROOKE SEAWELL; WILLIAM J. MILLER; TENCH COXE; MARK A. STEVENS; HARVEY C. JONES; CHRISTINE HOBERG; STEPHEN PETTIGREW; JAMES HOPKINS; JAMES WHIMS; GORDON A. CAMPBELL; RICHARD A. HEDDLESON; ALEX LEUPP; SCOTT D. SELLERS,

Defendants-Appellees.

No. 07-15077

D.C. No. CV-05-00427-JW

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted July 17, 2008
San Francisco, California

Before: FARRIS, SILER,** and BEA, Circuit Judges.

Plaintiffs CarrAmerica Realty Corporation ("CarrAmerica"), its related corporate entities, and Carlyle Fortran Trust ("Carlyle") (collectively "Creditors") appeal the order of the district court dismissing the Creditors' complaints for lack of standing. The district court held that only the Chapter 11 bankruptcy Trustee ("Trustee") had standing to pursue the claims. We affirm in part and reverse in part.

I. BACKGROUND

3dfx Interactive, Inc. ("3dfx") developed and manufactured computer graphics chips. In 1995, it entered into a ten-year commercial lease with Carlyle for 77,805 square feet in an office building in California. In 1998, it leased approximately 26,000 square feet of commercial space in Texas from CarrAmerica. In mid-2000, 3dfx began to experience financial difficulties. Ultimately, 3dfx decided to sell substantially all of its assets to NVIDIA, an unrelated company that also manufactured computer graphics

** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

chips. On December 15, 2000, 3dfx and NVIDIA entered into an Asset Purchase Agreement ("APA"), pursuant to which NVIDIA agreed to pay $70 million in cash for substantially all of 3dfx's assets.

On December 15, 2000, after executing the APA, 3dfx terminated its employees, and NVIDIA immediately rehired them. These NVIDIA employees continued working in the premises leased from CarrAmerica for an unspecified period of time, in violation of 3dfx's lease agreement with CarrAmerica, which agreement barred "anyone other than Tenant and its employees [from occupying] any part of the Premises." NVIDIA instructed 3dfx to continue to pay rent to CarrAmerica and agreed to reimburse 3dfx for these rent payments at a later date.

Eventually, 3dfx stopped paying rent to CarrAmerica and Carlyle. After the Creditors sued for nonpayment of rent, 3dfx filed Chapter 11 bankruptcy in October 2002. The Chapter 11 Trustee sued NVIDIA, seeking avoidance of a fraudulent transfer and recovery under a successor liability theory. The Creditors also filed suit against NVIDIA. The district court dismissed the Creditors' complaints for lack of standing. It held that all of the Creditors' claims alleged generalized injuries to the bankruptcy estate, meaning only the Trustee had standing to pursue the claims. The Creditors now appeal, arguing that the Trustee lacks standing to pursue the claims.

II. DISCUSSION

The district court's holding as to the Trustee's standing is a conclusion of law that we review de novo. *Smith v. Arthur Andersen LLP,* 421 F.3d 989, 1001 (9th Cir. 2005). The allegations of the complaint are taken as true. *Stoner v. Santa Clara County Office of Educ.,* 502 F.3d 1116, 1120 (9th Cir. 2007). A bankruptcy trustee is the representative of the bankrupt estate and has the capacity to sue and be sued. 11 U.S.C. § 323. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The debtor's "causes of action" are "property of the estate." *Smith,* 421 F.3d at 1002 (citing *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 205 n.9 (1983)). Thus, the trustee "stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy." *Id.* The trustee's standing to sue on behalf of the estate is exclusive; a debtor's creditors cannot prosecute such claims belonging to the estate unless the trustee first abandons such claims. *Estate of Spirtos v. One San Bernardino County Superior Court,* 443 F.3d 1172, 1175 (9th Cir. 2006).

Here, the district court properly concluded that the Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an

underlying injury to 3dfx. The substance of most the Creditors' claims is that 3dfx fraudulently transferred its assets to NVIDIA because the APA provided for insufficient consideration. While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation. *Smith,* 421 F.3d at 1002.

Most of the Creditors' other arguments lack merit. The district court did not err by relying on *In re Folks,* 211 B.R. 378 (B.A.P. 9th Cir. 1997), because it is consistent with *Smith* and our other decisions on trustee standing. The Creditors' attempt to distinguish *Folks* is unpersuasive. In *Folks,* the analysis of standing to object to the discharge of a debtor rested on whether a purported creditor had standing to pursue an alter ego claim. *Id.* at 381. *Folks* cited, discussed, and properly applied *Williams v. California 1st Bank,* 859 F.2d 664 (9th Cir. 1988). *See Folks,* 211 B.R. at 385-86. We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6)[1] gives rise to a

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[1] 11 U.S.C. § 502(b)(6) limits the amount of a bankruptcy claim "of a lessor for damages resulting from the termination of a lease of real property" to the extent that the "claim exceeds

> (A) the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –
>
> (i) the date of the filing of the petition; and

(Continued on following page)

particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim. The district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA.

The Creditors argue that Trustee standing is barred under *Shearson Lehman Hutton, Inc. v. Wagoner,* 944 F.2d 114, 120 (2d Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation."). However, the *Wagoner* rule has been much criticized and we decline to follow it. *See In re Senior Cottages of Am., LLC,* 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing).

Finally, however, the district court erred in dismissing CarrAmerica's interference with contractual relations and fraud claims based on an alleged

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(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property, plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates. . . . "

"secret agreement" between 3dfx and NVIDIA, pursuant to which agreement 3dfx continued to pay rent to CarrAmerica although NVIDIA had taken possession of the premises CarrAmerica leased to 3dfx. CarrAmerica contends that, absent the secret agreement, it could have insisted either that NVIDIA execute a written assumption of the lease or that 3dfx vacate the premises so that CarrAmerica could seek a new tenant. Because these claims are based on an injury to CarrAmerica by NVIDIA, which is neither bankrupt nor protected by any stay of actions, and not an underlying injury to the bankruptcy estate of 3dfx, CarrAmerica has standing to assert these claims.

Costs to be paid by Defendants-Appellees.

AFFIRMED in part, REVERSED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Carlyle Fortran Trust,
Plaintiff,
v.
nVidia Corporation, et al.,
Defendants.

NO. C 05-00427 JW

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS CARLYLE'S FOURTH AMENDED COMPLAINT WITH PREJUDICE

(Filed Dec. 15, 2006)

I. INTRODUCTION

Carlyle Fortran Trust ("Carlyle") brings this action against nVidia and the former officers and directors of 3dfx, alleging nine causes of action.[1] Carlyle's claims are similar to those made in related case *Carramerica Realty Corp. v. nVidia Corp., et al.*, No. C 05-0428 JW, also pending before the Court. Presently before the Court are two Motions to Dismiss Carlyle's Fourth Amended Complaint, brought respectively by the 3dfx Defendants and the nVidia Defendants. The Court conducted a hearing on April

[1] Defendants nVidia Corporation, nVidia U.S. Investment Company, and individual nVidia executives will be referred to collectively as "nVidia" or the "nVidia Defendants." The former directors and officers of 3dfx will be referred to collectively as "3dfx" or the "3dfx Defendants." When reference is made to all defendants in this case, they will be referred to as "Defendants."

17, 2006. Based on the papers submitted to date and the oral arguments of counsel, the Court GRANTS Defendants' Motions to Dismiss, with prejudice.

II. BACKGROUND

A. Factual Background

The historical facts of this case, with respect to the transaction between 3dfx and nVidia and 3dfx's subsequent bankruptcy are set forth in greater detail in the Court's September 29, 2006 Order Granting Defendants' Motion to Dismiss Carramerica's Third Amended Complaint in the related *Carramerica* case. (*See* C 05-0428 JW, Docket Item No. 121.) The Court provides only a brief recitation of pertinent facts below.

On August 7, 1995, 3dfx entered into a ten-year commercial lease ("Lease") with Carlyle's predecessor-in-interest; the term of the lease was from May 1, 1997 to April 30, 2007. (Fourth Amended Complaint ¶¶ 38, 40, hereafter, "FAC," Docket Item No. 134.) The lease was for a 77,805 square foot office building located in San Jose, California. (FAC ¶ 38.) Carlyle acquired rights under the Lease and title to the property in September 1999. (FAC ¶ 39.)

On January 1, 2002, 3dfx ceased to pay rent. (FAC ¶ 72.) Carlyle filed an action for breach of lease in Santa Clara County Superior Court. (FAC ¶ 74.) 3dfx filed a petition for dissolution in the same court, which was denied. *Id.* 3dfx then filed for Chapter 11

bankruptcy protection, which resulted in a stay of Carlyle's action for breach of lease as to 3dfx. *Id.*

B. Procedural Background

On January 3, 2003, the nVidia Defendants removed Carlyle's breach of lease action to bankruptcy court. The bankruptcy court subsequently appointed a trustee ("Trustee"). The Trustee filed a complaint against nVidia and its subsidiary, nVidia U.S. Investment Company, based on the asset purchase agreement between nVidia and 3dfx. The Trustee filed a similar action against the 3dfx Defendants in San Mateo County Superior Court.

In light of the Trustee's lawsuits, nVidia and 3dfx moved to dismiss Carlyle's action against them. The motions were granted with leave to amend. Carlyle has now filed its Fourth Amended Complaint, alleging the following claims: (1) Intentional Interference with Contractual Relations (against nVidia Defendants); (2) Negligent Interference with Economic Relations (against nVidia Defendants); (3) Successor Liability (against nVidia Defendants[2]); (4) Breach of Lease (against nVidia Defendants); (5) Breach of Fiduciary Duty (against 3dfx Defendants); (6) Aiding and Abetting Breach of Fiduciary Duty (against nVidia Defendants); (7) Declaratory Relief (against all

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[2] The Third Cause of Action is asserted against nVidia Corp. and nVidia U.S. Investment Corp., but not against the individual nVidia Defendants. (FAC ¶¶ 165-171.)

Defendants); (8) Unfair Business Practices (against all Defendants); and (9) Tort of Another (against all Defendants). Presently before the Court are Defendants' two Motions to Dismiss Carlyle's Fourth Amended Complaint.

III. STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief can be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistrer v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530-, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.,* 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusory allegations couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain,* 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa,* 886 F.2d 260, 262 (9th Cir. 1989). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith,* 203 F.3d 1122, 1129 (9th Cir. 2000).

The Federal Rules of Civil Procedure have established a liberal standard of "notice pleading." A plaintiff's factual pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) & (e)(1). The Supreme Court has explained that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). The Supreme Court has reaffirmed the liberal notice-pleading requirements by stating that a prima facie case is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema,* 534 U.S. 506, 510 (2002).

IV. DISCUSSION

A. Order in Related Case

Both Carlyle's lawsuit and related case *Carramerica Realty Corp. v. nVidia Corp., et al.*, No. C 05-0428 JW, are actions brought by landlords against nVidia and former directors and officers of 3dfx. Both actions claim that the terms and circumstances of 3dfx's sale of assets to nVidia adversely affected 3dfx's ability to pay rent. In its September 29, 2006 Order in *Carramerica,* the Court dismissed the plaintiff's Third Amended Complaint, with prejudice as to all but one claim, for lack of standing. (*See Carramerica,* Docket Item No. 121 at 4, hereafter, "*Carramerica* Order.") The Court held that under California law as interpreted by the Ninth Circuit, standing to pursue a general creditor's cause of action is delegated exclusively to the bankruptcy trustee unless a creditor can show personalized injury, which the plaintiff landlord could not allege.[3] *Id.*

B. Lack of Standing

The threshold issue before the Court is whether Carlyle possesses standing to assert its claims

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[3] A cause of action is general "if the liability is to all creditors of the corporation without regard to the personal dealings between [the corporation's] officers and creditors." (*Carramerica* Order at 5, quoting *Kalb. Vookis Corp. v. Am. Fin. Corp.*, 8 F.3d 130 (2nd Cir. 1993)). A cause of action is personal to the creditor if "the claimant himself is harmed and no other claimant or creditor has an interest in the case." *Id.*

against Defendants. Since many of the allegations of Carlyle's Fourth Amended Complaint are identical to the allegations disallowed by the Court for lack of standing in *Carramerica,* Defendants contend that Carlyle similarly lacks standing to assert its claims against them.[4] (Memorandum of Points and Authorities in Support of nVidia Defendants' Motion to Dismiss Carlyle's Fourth Amended Complaint at 7-11, hereafter, "nVidia Motion," Docket Item No. 153; Memorandum of Points and Authorities in Support of Motion to Dismiss Fourth Amended Complaint at 10-11, hereafter, "3dfx Motion," Docket Item No. 142.)

Carlyle's response is a tripartite theory of particularized injury that was not advanced in *Carramerica.* (Opposition of Carlyle Fortran Trust to nVidia Defendants' Motion to Dismiss Carlyle's Fourth Amended Complaint at 7, hereafter, "Carlyle's Opposition to nVidia's Motion," Docket Item No. 160.) First, Carlyle contends that it is the sole entity entitled to recover rent owed under the lease from nVidia, which assumed 3dfx's obligations. This rent was owed to Carlyle, not to 3dfx, and nVidia's obligation remains regardless of whether 3dfx dissolves. Second, after 3dfx and nVidia closed their asset purchase

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[4] With respect to Carlyle's claims against the 3dfx Defendants, on September 21, 2004, the Trustee and the 3dfx Defendants entered into a Settlement Agreement and Mutual Release ("Settlement Agreement") pursuant to which the 3dfx Defendants were to pay $5.5 million. The bankruptcy court approved the Settlement Agreement on November 19, 2004.

agreement, all creditors except Carramerica and Carlyle were allegedly paid 55 to 70 percent of their claims. *Id.* (citing FAC ¶¶ 111-113.) Third, 11 U.S.C. § 502(b)(6) imposes a "cap" on the dissipation of 3dfx's assets, such that even if the estate had assets sufficient to pay 100 percent of all claims, the estate would still pay Carlyle only $3 to $3.5 million, rather than the full $11 to $12 million owed under the lease. Carlyle contends that the Trustee has no standing to pursue claims in excess of the capped damages, as there is no injury to the estate; accordingly, only Carlyle has standing to sue for the amount owed in excess of the statutory cap. *Id.* at 7-8. Carlyle relies upon two cases in support of its theory of standing. *In re Modern Textile, Inc.*, 900 F.2d 1184 (8th Cir. 1990) and *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990). (Carlyle's Opposition to nVidia's Motion at 8.)

In the case of *In re Modern Textile, Inc.*, buyer purchased the business and operating assets of seller and executed a lease of seller's facilities. The lease was guaranteed by buyer's parent and sister companies ("guarantors"). 900 F.2d at 1186-87. The buyer subsequently defaulted, and the seller sued the guarantors. Buyer was forced into bankruptcy, and the seller's suit against the guarantors was removed to bankruptcy court. In bankruptcy court, the trustee of buyer's estate rejected the unexpired portion of the lease pursuant to 11 U.S.C. § 365. *Id.* at 1187. The Eighth Circuit nevertheless allowed seller's claim against the guarantors: "[a]lthough [Section 502(b)(6)

of] the Bankruptcy Code limits the amount which a lessor can claim against the debtor's bankrupt estate following the Trustee's rejection of an unexpired lease, that limitation does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate." *Id.* at 1191 (internal citations omitted). Since the seller's claim survived the trustee's rejection, seller could still recover from guarantor. *Id.* The Eighth Circuit's conclusion was buoyed by 11 U.S.C. § 524(e), which provides, "the discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt." *Id.* at 1192.

Carlyle's second case is the Tenth Circuit case of *In re Western, Inc.* In that case, two transformers maintained by the Public Service Company of Oklahoma (PSO) exploded, damaging debtor's facility. 922 F.2d at 594. Debtor's counsel pursued litigation against PSO for a reduced hourly fee supplemented by a reduced contingent fee. Counsel secured his fee via attorney's lien. Debtor subsequently petitioned for Chapter 11 bankruptcy, settled its case against PSO, and agreed to indemnify PSO should it be held liable to counsel for ignoring the attorney's lien. The Tenth Circuit held that (1) contractual rights and obligations remain notwithstanding the trustee's rejection of an executory portion of the contract and (2) notwithstanding the discharge of a debtor's obligation to pay, the creditor can still collect from other entities liable for the debt. *Id.* at 595, 600. The court specifically held that even the creditor's recovery of partial

satisfaction does not bar litigation against third parties for the remainder of the discharged debt, even if the claim stems from an executory contract subject to limitation pursuant to 11 U.S.C. § 501(b). *Id.* at 601.

No Ninth Circuit case has held that a landlord may state a particularized injury for a claim against a third party for rents in excess of the Section 502 damages cap. To the contrary, the case of *In re Perry Arden* casts doubt on this proposition. 176 F.3d 1226 (9th Cir. 1999). In that case, lessor and lessee entered into a long-term lease, guaranteed by guarantor, which lessee subsequently breached. Lessor sued lessee and guarantor in state court for damages, and the state court granted a prejudgment writ of attachment. Before the state court case concluded, guarantor filed for Chapter 11 bankruptcy, and lessor filed an unsecured creditor's claim in the amount of the prejudgment attachment. The parties disputed whether the damages cap should apply to lessor's claim. *Id.* at 1227-28. The Ninth Circuit held in a case of first impression that the damages cap in Section 502(b)(6) applied to lease guarantors. More generally, the court held, "[a] plain reading of [Section 502(b)(6)] underscores that it is the claim of the lessor, not the status of the lessee – or its agent or guarantor – that triggers application of the [damages] Cap." *Id.* at 1229. The Court found that the only two predicates to application of the damages cap were a "claim of a lessor" and "damages resulting from the termination of a lease of real property." *Id.*

In this case, both predicates are present. Carlyle's claim is undisputedly a claim of a lessor. Moreover, Carlyle seeks damages resulting from the termination of a lease of real property. However, since the Ninth Circuit's holding applying the damages cap placed substantial weight on the insolvency of the *In re Perry Arden* guarantor or lessee, the Court does not construe the case as absolutely barring Carlyle's claims against nVidia, a solvent third-party. Accordingly, the Court accepts as cognizable the theory that a landlord, here Carlyle, has standing to state a particularized injury for a claim against a third party, here nVidia, for rents in excess of Section 502's damages cap. The Court proceeds to consider whether Carlyle's Fourth Amended Complaint states such a claim.

C. Intentional Interference with Contract

Carlyle's First Cause of Action is asserted against the nVidia Defendants for intentional interference with contract relations. Carlyle alleges that the nVidia Defendants intentionally interfered with the contractual relationship between Carlyle and 3dfx by preventing Carlyle from "buying out" the lease from 3dfx and reletting the premises while the market was "hot," forcing 3dfx to discontinue its operations, dissolve, and liquidate, and failing to assume the lease. (FAC ¶¶ 136-146.)

Under California law, a cause of action for intentional interference with contract has five elements:

(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional act designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damages. *Tuchscher Development Enters., Inc. v. San Diego Unified Port Dist.,* 106 Cal. App. 4th 1219, 1239 (2003).

Carlyle's claim fails for two independent reasons. First, it is not a particularized claim against a third party for rent in excess of the 502(b)(6) cap. Rather, it is based on the Asset Purchase Agreement between nVidia and 3dfx, and as such, concerns events that affected all creditors. There exists no significant difference between this claim and the claim for intentional interference with contract in *Carramerica,* which the Court dismissed. (*See* Carramerica Order at 5-6.) Second, Carlyle cannot state a claim based on its allegation that the nVidia Defendants "prevent[ed] Carlyle from buying out the Lease from 3dfx and reletting the Premises when the market was hot." (FAC ¶ 142.) Carlyle does not allege that 3dfx was bound by the lease to accept Carlyle's buyout offer. It logically follows that even if nVidia prevented Carlyle from buying out the lease from 3dfx, nVidia's action did not cause 3dfx to breach the lease. As such, this first allegation does not satisfy the third and fourth elements of a claim for intentional interference with contract.

The Court dismisses Carlyle's claim for intentional interference with contract against the nVidia Defendants. The Court previously determined that Carlyle does not have standing to pursue this claim, as it is a general injury. (*See* Order Dismissing Third Amended Complaint with Leave to Amend at 4-5, hereafter, "Order Dismissing TAC," Docket Item No. 133.) Carlyle has nonetheless relied verbatim on the allegations in its Third Amended Complaint to support its intentional interference with contract claim in the Fourth Amended Complaint. (Compare Third Amended Complaint ¶¶ 83-92, hereafter, "TAC," Docket Item No. 62, with FAC ¶¶ 136-146.) Accordingly, the Court dismisses Carlyle's First Cause of Action for intentional interference with contract against the nVidia Defendants with prejudice.

D. Negligent Interference with Economic Relations

Carlyle's Second Cause of Action is asserted against the nVidia Defendants for negligent interference with economic relations. Carlyle alleges that nVidia breached its duty of care not to interfere with the economic relationship between 3dfx and Carlyle. The factual allegations supporting this claim parallel those for Carlyle's claim for intentional interference with contract, above. (FAC ¶¶ 150-161.)

Under California law, this tort arises only where the defendant owes the plaintiff a duty of care. *Stolz v. Wong Comm. L.P.*, 25 Cal. App. 4th 1811, 1825

(1994). To establish a duty of care, the plaintiff must allege the defendant's "blameworthy" conduct; that is, conduct that is "independently wrongful apart from the interference itself." *Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1187 (1998) (internal citations omitted). An act is not independently wrongful "merely because defendant acted with an improper motive," but only if "it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003).

As above, this is not a particularized claim against the nVidia Defendants for rent in excess of the Section 502(b)(6) damages cap. Rather, underlying any claim for negligent interference with the economic relations between Carlyle and 3dfx is the implicit allegation that nVidia paid an insufficient amount for 3dfx's assets. This claim belongs to the Trustee. Accordingly, the Court dismisses Carlyle's Second Cause of Action for negligent interference with economic relations against the nVidia Defendants with prejudice.

E. Successor Liability

Carlyle's Third Cause of Action is a theory of successor liability asserted against the nVidia Defendants. Carlyle alleges that nVidia acquired substantially all of 3dfx's assets for inadequate consideration, and bears successor liability for two reasons: (1) nVidia paid insufficient consideration

for the fraudulent purpose of allowing 3dfx to evade its obligation to Carlyle under the Lease and (2) nVidia agreed to assume the lease pursuant to the APA. (FAC ¶¶ 166, 168.) The Court considers each of Carlyle's theories in turn.

In California, the default presumption is corporate successor *non-liability*; that is, a corporation that purchases all or most of the assets of another corporation is generally not liable for the debts and liabilities of the selling corporation. *McClellan v. Northridge Park Townhome Owners Ass'n, Inc.*, 89 Cal. App. 4th 746, 753 (2001) (quoting *Ortiz v. South Bend Lathe*, 46 Cal. App. 3d 842, 846 (1975)). This presumption is based on the generally established principle that "a sale of corporate assets transfers an interest separable from the corporate entity and does not result in a transfer of unbargained-for liabilities from the seller to the purchaser." *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 262 (1984).

The four recognized exceptions to successor non-liability under California law are (1) the purchaser's express or implied assumption of liability; (2) a de facto merger of the two corporations; (3) a purchasing corporation that is a "mere continuation" of the selling corporation; and (4) a fraudulent transaction to escape liability for debts. *McClellan*, 89 Cal. App. 4th at 753 (internal citations omitted). These exceptions were developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions. *Hall*, 103 Wn.2d at 262.

Carlyle alleges each of these four exceptions to successor non-liability. (FAC ¶ 169.) However, Carlyle lacks standing to bring its claim under its first theory of successor liability, that nVidia's purchase of 3dfx's assets left 3dfx without a means to pay its debts. This is because this theory (regardless of which exception to successor non-liability is used) relies on harm that affected 3dfx as a corporation, and such claims belong to the Trustee. This first theory is not affected by the damages cap. The Court considers and dismisses Carlyle's second theory, that the nVidia Defendants assumed a rental obligation, below in its discussion of Carlyle's Fourth and Fifth Causes of Action. Accordingly, the Court dismisses Carlyle's Third Cause of Action for successor liability against the nVidia Defendants with prejudice.

F. Breach of Lease

Carlyle's Fourth Cause of Action is asserted against the nVidia Defendants for breach of lease. Carlyle alleges two alternate theories: (1) 3dfx is now nVidia, by virtue of a de facto merger to which successor liability applies or (2) nVidia became the tenant under the Lease in April 2001 by virtue of an express agreement to assume the Lease. (FAC ¶ 173.)

The California statute of frauds provides that an agreement for the lease of real property for a term exceeding one year is invalid unless evidence of the contract is writing and subscribed by the party to be charged. Cal. Civ. Code § 1624(a)(3). For a contract to

which the statute of frauds applies, all material terms must be reduced to writing; none can be supplied by parol evidence. *Riley v. Bear Creek Planning Committee,* 17 Cal. 3d 500, 509 (1976) (partially overruled on other grounds).

The Trustee does not have standing to pursue a claim against nVidia for unpaid rent beyond the Section 502(b)(6) damages cap. Applying the reasoning of Section IV.A above, Carlyle may state a claim against the nVidia Defendants for failure to pay rent in excess of the damages cap, absent any other legal impediment. Here, the Court finds that the statute of frauds applies to bar Carlyle's claim. The nVidia Defendants allegedly assumed the lease in April 2001. (FAC ¶ 173.) nVidia's assumption of the Lease is allegedly evidenced by Exhibit B of the December 18, 2000 schedules, entitled "Specified Assets and Assumed Contracts."[5] (FAC ¶ 92, Ex. C.) However, the document is not subscribed by nVidia, the party to be charged under the statute of frauds. (*See id.*, Ex. C.) Rather, the document is a facsimile version of a blackline revision of the Schedules to the Asset Purchase Agreement, sent from 3dfx to Steve Pettigrew, an nVidia in-house attorney. As such, it is plainly preliminary and does not evidence nVidia's consent to

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[5] This document is attached to the Fourth Amended Complaint. (*See* FAC, Ex. C.) Accordingly, the Court properly considers it in evaluating the nVidia Defendants' Motion to Dismiss. *See, e.g. Parks School of Business v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995).

assume the Lease. Since the documents do not satisfy the statute of frauds, Carlyle's claim for breach of lease is barred to the extent that it relies on the theory that the nVidia Defendants expressly agreed to assume the Lease.

Further, Carlyle may not rely on the existence of any alleged implied agreement; to permit recovery on such a theory defeats the purpose of the statute of frauds to prevent fraud and perjury. Lastly, Carlyle may not rely on parol evidence to establish the writing. *See Riley,* 17 Cal. 3d at 509. Accordingly, the Court dismisses Carlyle's Fourth Cause of Action for breach of lease against the nVidia Defendants with prejudice.

G. Breach of Fiduciary Duty

Carlyle's Fifth Cause of Action is asserted against the 3dfx Defendants for breach of fiduciary duty. Carlyle alleges that the 3dfx Defendants breached their fiduciary duties in at least five ways. First, they treated Carlyle differently than other 3dfx creditors. Second, they failed to enforce or disclose to Carlyle that nVidia had agreed to assume the Lease. Third, they allowed nVidia to decide whether to allow Carlyle to buyout the Lease. Fourth, they approved and closed the Asset Purchase Agreement in disregard of the express terms of the Lease, including rights provided to Carlyle. Fifth, they negotiated the APA in a manner that unjustly promoted the interests of 3dfx

shareholders and certain classes of creditors and the expense of other creditors. (FAC ¶ 181.)

The Court dismissed the first,[6] fourth, and fifth of these allegations, which previously appeared in Carlyle's Third Amended Complaint, pursuant to *In re Folks,* 211 B.R. 378 (9th Cir. BAP 1997). (Order Dismissing TAC at 6; *see also* TAC ¶ 144(a)-(c)). The Court declines to revisit its earlier holding.[7] Carlyle's second allegation is premised on nVidia's alleged assumption of the Lease, which is unenforceable under the statute of frauds, as explained in Section IV.F, *supra.* The sole surviving theory underlying Carlyle's Fifth Cause of Action, then, is Carlyle's third

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[6] With respect to Carlyle's first allegation, the Court additionally notes that Cal. Civ. Code § 3432 provides, "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

[7] In its previous Order, the Court held that a claim could be stated that the 3dfx Defendants breached their fiduciary duties to 3dfx creditors when the company was in the zone of insolvency, but that Carlyle was not the proper party to bring that claim. The Ninth Circuit found in *In re Folks* that derivative claims on an insolvent corporation's behalf are asserted exclusively by the bankruptcy trustee. 211 B.R. at 384-85. Accordingly, the Court held, "Because the claim that Defendants breached their fiduciary duty by entering into an APA which did not provide enough in cash for the bankruptcy estate is general to all creditors, the rule of *In re Folks* that the trustee has exclusive jurisdiction to assert claims where 'liability is to all creditors of the corporation' bars Carlyle from asserting a claim for breach of fiduciary duty against the 3dfx Defendants." (Order Dismissing TAC at 6-7.)

allegation, that 3dfx allowed nVidia to decide whether or not to allow Carlyle to buy out the Lease.

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of that duty; and (3) damages proximately caused by the breach. *Stanley v. Richmond,* 35 Cal. App. 4th 1070, 1086 (1995). Ordinarily, corporate directors do not owe fiduciary duties to creditors; rather, the relationship between creditors and corporate debtors is contractual in nature. *Official Comm. of Bond Holders of Mericom, Inc. v. Derrickson,* 2004 WL 2151336, *3 (N.D. Cal. Feb. 25, 2004). When a corporation becomes insolvent, however, the insolvency triggers fiduciary duties of directors for the benefit of creditors. *Id.* (quoting *In re Hechinger Investment Co. of Delaware,* 274 B.R. 71, 84 (D. Del. 2002)).

Carlyle alleges that the 3dfx Defendants owed it fiduciary duties, as directors and officers of a corporation on the brink of insolvency. (FAC ¶ 180.) The Court finds that the 3dfx Defendants at most owed a general duty to all creditors. Any breach of the duty inherent in the signing and execution of the APA affected all of 3dfx's creditors. If the 3dfx Defendants allowed nVidia to decide whether or not to allow Carlyle to buy out the Lease pursuant to the APA, then this is at most one manifestation of breach of the generalized duty that the 3dfx Defendants owed to all 3dfx creditors. The Court finds that it does not represent a particularized injury to the landlord. Accordingly, the Court dismisses Carlyle's Fifth Cause of

Action for breach of fiduciary duty against the 3dfx Defendants with prejudice.

H. Aiding and Abetting Breach of Fiduciary Duty

Carlyle's Sixth Cause of Action is asserted against the nVidia Individual Defendants for aiding and abetting the 3dfx Defendants' breach of fiduciary duty. Carlyle alleges that the nVidia Individual Defendants (1) approved the 3dfx executives' disparate treatment of Carlyle; (2) failed to disclose to Carlyle that nVidia agreed to assume the Lease under the nVidia agreement; (3) caused 3dfx to reject Carlyle's efforts to buy out the Lease; (4) failed to proceed with assumption of the Lease; and (5) approved and closed on the APA. (FAC ¶ 185.)

Under California law, liability may be imposed on one who aids and abets the commission of an intentional tort, including breach of fiduciary duty, if the person (1) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (2) gives substantial assistance to the other in accomplishing a tortious result and the person's conduct, separately considered, constitutes a breach of duty to a third person. *Casey v. U.S. Bank Nat'l Ass'n,* 127 Cal. App. 4th 1138, 1144 (2005). The Court found analogous allegations insufficient to support Carlyle's cause of action against the 3dfx Defendants for breach of fiduciary duty. Again, any alleged breach of fiduciary

duty by the 3dfx Defendants, or aiding and abetting of that tort by the nVidia Individual Defendants, affected all creditors generally. Accordingly, the Court finds that this claim properly belongs to the Trustee. The Court dismisses Carlyle's Sixth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty against the nVidia Individual Defendants with prejudice.

I. Declaratory Relief

Carlyle's Seventh Cause of Action is asserted against all Defendants for declaratory relief. Carlyle seeks a judicial determination of the rights and duties of Carlyle and all Defendants. (FAC ¶ 191.) A request for declaratory relief does not create a new cause of action. Rather, the plaintiff must specifically plead an "actual, present controversy" and provide the facts of the respective claims concerning the underlying subject. The plaintiff cannot satisfy the requirement to allege an "actual, present controversy" merely by pointing to the lawsuit in which he or she seeks declaratory relief. *City of Cotati v. Cashman,* 29 Cal. 4th 69, 80 (2002) (internal citations omitted). Here, Carlyle's claim for declaratory relief is wholly derivative of its preceding claims. Consistent with the views previously expressed in this Order, the Court dismisses Carlyle's Seventh Cause of Action for Declaratory Relief against all Defendants with prejudice.

J. Unfair Business Practices

Carlyle's Eighth Cause of Action is asserted against all Defendants for unfair business practices. Carlyle alleges that the Defendants' previously described actions constitute unlawful, unfair, or fraudulent business practices within the meaning of California Business and Professions Code § 17200. (FAC ¶ 193.) Specifically, the nVidia Defendants conspired to defraud 3dfx's creditors by entering into the APA and labeling it an "asset purchase agreement" rather than a merger or consolidation, in order to obtain substantially all of 3dfx's assets while escaping liability for its debts. (FAC ¶¶ 47, 58.) Carlyle further alleges that the 3dfx Defendants were involved in this fraudulent conspiracy. (FAC ¶ 194.)

Under § 17200, "any unlawful, unfair, or fraudulent business act or practice" is prohibited. Cal. Bus. & Prof. Code § 17200. "Unlawful" conduct is conduct "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Sup. Ct.,* 27 Cal. App. 4th 832, 839 (1994) (citing *People v. McKale,* 25 Cal. 3d 626, 632 (1979)). "Unfair" conduct means "any practice whose harm to the victim outweighs its benefits." *Id.* (citing *Motors, Inc. v. Times Mirror Co.,* 102 Cal. App. 3d 735, 740 (1980)). "Fraudulent" conduct is conduct likely to deceive members of the public; it does not refer to the tort of fraud. *Id.* (citing *Bank of the West v. Sup. Ct.,* 2 Cal. 4th 1254, 1267 (1992)).

The Court finds that Carlyle's allegations are sufficient to state a claim under the unfair act or

practice prong of Section 17200. However, as before, this claim affected all creditors alike, and consequently belongs to the Trustee. The Court dismisses Carlyle's Eight [sic] Cause of Action for Unfair Business Practices against all Defendants with prejudice.

K. Tort of Another

Carlyle's Ninth Cause of Action is for tort of another against the nVidia Defendants. Carlyle alleges that due to the nVidia Defendants' tortious conduct, Carlyle was required to pursue damages against 3dfx for breach of lease, to prosecute claims in the instant action, and to assert claims against 3dfx in its bankruptcy proceeding. (FAC ¶ 199.)

In California, the general rule, subject to several exceptions, is that each party must pay his or her own attorneys' fees. Cal. Code Civ. Proc. § 1021. One of the exceptions is the "tort of another," or "third party tort" exception, which allows the plaintiff to recover attorneys' fees when he or she has employed counsel to prosecute or defend a third party action because of the defendant's tortious conduct. *Gray v. Don Miller & Associates, Inc.*, 35 Cal.3d 498, 504 (1984). A plaintiff's "entitlement to recoupment of any attorney fees as damages arising from [defendant's] allegedly tortious behavior depends upon plaintiff's success in proving that tortious conduct in fact occurred." *See Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1551 n.19 (1998).

The Court finds that Carlyle's claim for tort of another is wholly derivative of its other claims, which have been dismissed. Accordingly, the Court dismisses Carlyle's Ninth Cause of Action for Tort of Another against the nVidia Defendants with prejudice.

L. nVidia's Motion to Strike

The Court acknowledges receipt of nVidia's Motion to Strike Improper Material in Plaintiff Carlyle Fortran Trust's Fourth Amended Complaint. (*See* Docket Item No. 147, hereafter, "Motion to Strike"). nVidia contends that the Court should strike portions of the FAC that it characterizes as a "back-door effort to request reconsideration [of the Court's Order dismissing Carlyle's Third Amended Complaint.]" (Motion to Strike at 2.) In light of this Order, nVidia's Motion is denied as moot.

V. CONCLUSION

The Court GRANTS Defendants' Motions to Dismiss Carlyle's Fourth Amended Complaint. The Court finds that there are no circumstances under which Carlyle may state a claim for a particularized injury. Accordingly, the dismissal is with prejudice.

Dated: December 15, 2006

/s/ James Ware
JAMES WARE
United States
District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Douglas A. Applegate daa@sezalaw.com
Dwight Craig Donovan Dwight@mbvlaw.com
George M. Lee gml@sezalaw.com
Henry H. Oh henry.oh@dlapiper.com
James N. Kramer jkramer@orrick.com
Jonathan B. Gaskin jgaskin@orrick.com
Justin Myer Lichterman jlichterman@orrick.com
Karen Johnson-McKewan
kjohnson-mckewan@orrick.com
Kim Y. Arnone karnone@buchalter.com
Leah Anne Nutting lnutting@orrick.com
Michael Todd Scott tscott@orrick.com
Morgan William Tovey mtovey@reedsmith.com
Richard C. Darwin rdarwin@buchalter.com
Robert P. Varian rvarian@orrick.com
Ruth Young Kwon rkwon@orrick.com

Dated: December 15, 2006

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARRAMERICA REALTY CORPORATION; et al., Plaintiffs-Appellants, and CARLYLE FORTRAN TRUST, Plaintiff, v. NVIDIA CORPORATION; et al., Defendants-Appellees 3DFX INTERACTIVE, Inc., Debtor-in-Possession-Appellee, WILLIAM A. BRANDT, Jr., Trustee-Appellee.	Nos. 06-17109 D.C. No. CV-05-00428-JW ORDER AMENDING MEMORANDUM (Filed Jan. 22, 2009)
CARLYLE FORTRAN TRUST, Plaintiff-Appellant, v. NVIDIA CORPORATION; NVIDIA US INVESTMENT COMPANY; JEN-HSUAN HUANG; JAMES C. GAITHER; A. BROOKE SEAWELL; WILLIAM J. MILLER;	No. 07-15077 D.C. No. CV-05-00427-JW

TENCH COXE; MARK A. STEVENS; HARVEY C. JONES; CHRISTINE HOBERG; STEPHEN PETTIGREW; JAMES HOPKINS; JAMES WHIMS; GORDON A. CAMPBELL; RICHARD A. HEDDLESON; ALEX LEUPP; SCOTT D. SELLERS,

Defendants-Appellees.

Before: FARRIS, SILER,* and BEA, Circuit Judges.

The memorandum disposition filed November 25, 2008, is hereby amended as follows:

memorandum at 7, line 15	Replace "interference with contractual relations and fraud claims" with "interference with contractual relations, fraud, conspiracy, and tort of another claims"
memorandum at 8	Insert the following new paragraph after "Carr-America has standing to assert these claims.":
	On remand, the district court is instructed to determine which of Carlyle's

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

	claims have been abandoned by the bankruptcy trustee, thus conferring standing on Carlyle to pursue these claims. *See Estate of Spiritos*, 443 F.3d at 1175.
memorandum at 8	Replace "Costs to be paid by Defendants-Appellees" with the following text:
	Costs in appeal no. 06-17109 to be paid by Defendants-Appellees NVIDIA Corp., NVIDIA US Investment Co. No. 2, Jen-Hsuan Huang, James C. Gaither, A. Brooke Seawell, William J. Miller, Tench Coxe, Mark A. Stevens, and Harvey C. Jones; costs in appeal no. 07-15077 to be paid by Plaintiff-Appellant Carlyle Fortran Trust.

The full court has been advised of the petition for an en banc rehearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). Therefore, the petition for rehearing en banc is denied. No future petitions for rehearing shall be entertained.

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11 U.S.C. § 502. Allowance of claims or interests

* * *

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise

applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

* * *

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11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the

employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * *

Cal. Civ. Code §1624. Statute of frauds

(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property

purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

* * *

Cal. Civ. Code §1633.4. Further application of title

This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000.

Cal. Civ. Code §1633.7. Legal effect or enforceability of electronic record, signature, or contract

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Cal. Civ. Code §1633.9. Attribution of electronic record or signature

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.